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No. 75-866

In the
Supreme Court of the United States
October Term, 1975

M.J.D.M. TRUCK RENTALS, INC., and
WILLIAM V. DEMAIO,
Petitioners,

vs.

WILLIAM J. O'BRIEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. The Court Of Appeals For The Seventh Circuit, Pell, Stevens, And Tone, Circuit Judges, Has Rendered A Decision In Conflict With The April 10, 1967 Decision Of The Court Of Appeals For The Seventh Circuit, Knoch, Fairchild, And Cummings, Circuit Judges, On The Issue Of Whether Or Not A Stay Of Execution Order Entered In The District Court Prevents The Creation Of A Federal Judgment Lien On Real Property Located In Illinois Under Illinois Law 14

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, M.J.D.M. Truck Rentals, Inc. and William V. Demaio, respectfully pray that a writ of certiorari issue to review the August 26, 1975 judgment and opinion of the United States Court of Appeals for the Seventh Circuit reversing a jury verdict returned against an Illinois attorney in a legal malpractice action for negligently failing to create a judgment lien on a defendant's real property before the defendant commenced bankruptcy proceedings.

OPINION DELIVERED IN THE COURT BELOW

The opinion delivered upon the rendering of the judgment sought to be reviewed, not yet reported, is appended hereto, including the opinion in *Hamilton Steel Products, Inc.* v. *Yorke,* 376 F.2d 463 (7th Cir. 1967), reference to which is necessary to ascertain the grounds of the judgment sought to be reviewed.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed is August 12, 1975, and the time of its entry is August 12, 1975.

The date of the order denying a rehearing is September 23, 1975.

The statutory provision believed to confer jurisdiction on this court to review the judgment in question by a writ of certiorari is 28 U.S.C. § 1254(1).

The writ of certiorari intended to bring the August 12, 1975 judgment of the United States Court of Appeals for the Seventh Circuit before the Supreme Court was applied for within ninety days after the entry of an order denying rehearing as prescribed by law.

QUESTIONS PRESENTED FOR REVIEW

1. Does a final judgment duly entered in a district court pursuant to Rules 58 and 79 F.R.C.P. cease being final upon the filing of post trial motions and then become interlocutory pending the disposition of post trial motions, or does a final judgment continue to remain final from the date of its entry, and the filing of post trial motions merely toll the computation of time for the purpose of Appellate Court jurisdiction?

2. Shall every judgment rendered by a district court within the State of Illinois be a lien on the real property within Illinois as provided by the law of Illinois, or does a stay of execution prevent the creation of a federal judgment lien?

RULES AND STATUTES WHICH THE CASE INVOLVES

Federal Rules of Civil Procedure:

Rule 58 **Entry of Judgment**

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Rule 79 **Books and Records Kept by the Clerk and Entries Therein**

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as

may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approvel of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

United States Code, Title 28:

Section 1291. **Final decisions of district courts**

The courts of appeals shall have jurisdiction of appeal from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands,

except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(c), 72 Stat. 348.

Section 1962. **Lien**

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State. June 25, 1948, c. 646, 62 Stat. 958.

Section 2107. **Time for appeal to court of appeals**

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after

the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104.

Illinois Revised Statutes, Chapter 77:

Section 69. **Judgments, etc., of U.S.—May be registered, etc.**

Judgments and decrees of courts of the United States held, within this state, and all writs, returns, certificates of the levy or a writ, and records of said courts may be registered, recorded, docketed, indexed or otherwise dealt with in, the public offices of this state, so as to make them conform to the rules and requirements relating to judgments and decrees of courts of this state. 1889, April 29, Laws 1889, p. 197, sec. 1.

Section 69a. **Lien of Federal Judgments**

Upon filing in the office of the recorder of deeds in any county of this state of a transcript, certified copy or memorandum of a judgment or decree rendered or made in this state by a court of the United States, such judgment or decree shall be a lien upon the real estate of the person against whom the same is rendered or made, in the county where filed, in like manner as judgments and decrees of courts of this state. The term "memorandum" as used herein shall mean a memorandum or copy of the judgment signed by a judge of the court rendering or making

it and showing the court in which rendered or made, date, amount, case number of the case in which rendered or made, name of the party in whose favor, and name of the party against whom rendered or made. However, no such judgment or decree shall be a lien on any real estate, registered under the provisions of "An Act concerning land titles", approved May 1, 1897, as amended,[1] until the provisions of Section 85 of said Act[2] have been complied with. 1889, April 29, Laws 1889, p. 197, sec. 2, added 1929, June 10, Laws 1929, p. 537. Sec. 1, as amended 1963, Aug. 9, Laws 1963, p. 2677, sec. 1.

Section 1. **Lien of Judgment**

With respect to the creation of liens on real estate by judgments, all real estate in the State of Illinois is divided into 2 classes.

• • •

As to real estate included within class two, a judgment shall be a lien on the real estate of the person against whom it is rendered or made in any county in this State, including the county in which it is rendered or made, only from the time a transcript, certified copy or memorandum of the judgment is filed in the office of the recorder of deeds in the county in which the real estate is located.

A judgment shall not be a lien on real estate for longer than 7 years from the time it is rendered or revived.

• • •

Section 2. **Time of restraint deducted**

When the party in whose favor a judgment is rendered is restrained, by injunction, or by appeal, or by the order of a judge or court, or is delayed, on

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[1] Chapter 30, § 149 et. seq.
[2] Chapter 30, § 122.

account of the death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned in Sections 1 or 6 of this Act. Amended by P.A. 77-970, § 1, eff. Aug. 17, 1971.

Section 6. **Limitation on execution**

No execution shall issue upon any judgment after the expiration of 7 years from the time the same is rendered, except upon the revival of the same by scire facias or by other proceeding provided by law; but real estate, levied upon within said 7 years, may be sold under the writ of execution at any time within one year after the expiration of said 7 years. 1872. March 22, Laws 1971 72, p. 505, § 6; 1963, Aug. 9, Laws 1963, p. 2678, § 1.

STATEMENT OF THE HAMILTON STEEL PRODUCTS, INC. v. YORKE CASE

M.J.D.M. Truck Rentals, Inc., a Pennsylvania corporation, commenced a civil action, based upon diversity of citizenship, against Hamilton Steel Products, Inc., an Illinois corporation, in the United States District Court for the Northern District of Illinois, Eastern Division. Judgment was duly entered pursuant to Rules 58 and 79 F.R.C.P. on June 3, 1964, in favor of MJDM and against Hamilton in the amount of $107,587.06.

Rule 62(a) F.R.C.P. automatically stayed execution upon the judgment until June 13, 1964. On June 12, 1964, Hamilton filed post trial motions and on June 23, 1964, a Rule 62(b) F.R.C.P., discretionary stay of execution order, without any condition for security, was entered.

On December 9, 1964, Hamilton instituted bankruptcy proceedings in the United States District Court for the

Northern District of Illinois, Eastern Division, and, pursuant to the provisions of Section 70(c) of the Bankruptcy Act, the Trustee in Bankruptcy's rights as an ideal judicial lien creditor vested on that date.

Upon receiving notice of sale of Hamilton's real estate by the bankruptcy court, MJDM duly recorded its June 3, 1964 federal judgment against Hamilton with the Recorder of Deeds of Cook County, Illinois, on March 12, 1965, for the purpose of creating a federal judgment lien as prescribed by Title 28, U.S.C. § 1962 and Chapter 77, Ill. Rev. Stat. §§ 69 and 69a on Hamilton's class two real estate under Illinois law.

On March 16, 1965, Hamilton's real estate located in Cook County, Illinois, was sold for the sum of $327,000.00, free and clear of all encumbrances.

On April 1, 1965, MJDM executed a release of judgment lien on Hamilton's property and entered into a stipulation with the Trustee in Bankruptcy that if MJDM's lien was valid as against the trustee's December 9, 1965 lien, it (MJDM's lien) would attach to and be paid out of the proceeds derived from the sale of the real estate.

On May 14, 1965, MJDM filed in the district court a "Motion for Entry of an Order Pursuant to Rule 60(b) F.R.C.P. for Issuance of a Writ of Execution Nunc Pro Tunc, to Enforce Plaintiffs' Judgment of June 3, 1964 or for Alternative Relief", alleging mistake and inadvertance as to Hamilton's financial condition.

On July 23, 1965, the district court entered an order dismissing the 60(b) motion "without prejudice to the right of the plaintiff to raise any issues in the bankruptcy proceedings which may relate in any way to the priority of its claimed lien".

On December 3, 1965, the bankruptcy court held that the Trustee in Bankruptcy had acquired the status of a lien creditor on December 9, 1964, and since MJDM's judgment did not become a lien until March 12, 1965, MJDM's lien was null and void as against the trustee. To avoid this result, MJDM alleged that because of Rule 62(b) F.R.C.P., discretionary stay of execution, it was restrained from perfecting its lien prior to the bankruptcy. The bankruptcy court held this argument, as a matter of law, to be without merit.

The United States District Court for the Northern District of Illinois, Eastern Division, affirmed the order of the bankruptcy court and MJDM appealed to the United States Court of Appeals for the Seventh Circuit.

On appeal, MJDM argued that it was prevented by the June 23, 1964 Rule 62(b) stay of execution order from promptly recording its judgment and that the effect of 77 Ill. Rev. Stat., §2 was to make the effective date of the March 12, 1965 lien "relate back" to June 23, 1964, prior to the trustee's lien.

On April 10, 1967, the Seventh Circuit Court of Appeals, Knoch, Fairchild, and Cummings, Circuit Judges, affirmed the District Court's order.

The opinion written by Walter J. Cummings, Circuit Judge, states at pages 5 and 6:

> Therefore, the stay of execution did not prevent MJDM from recording, nor could MJDM have reasonably thought so. In Illinois, a judgment lien and execution on a judgment are different things. *Reconstruction Finance Corporation* v. *Maley*, 125 F.2d 131, 133 (7th Cir. 1942) recognizes this difference. There the plaintiff recorded a transcript of his judg-

ment in Knox County, Illinois, and this Court observed:

> ". . . plaintiff, by the filing of such transcript, acquired a lien upon the debtor's real estate in Knox County. No execution was issued upon such transcript . . . ."

In other words, the creation of a judgment lien and an execution are considered separate incidents.

In sum, nothing in the June 23, 1964, stay order prevented MJDM from recording its judgment. Moreover, there was no stay order in effect between June 13, 1964 and June 23, 1964. MJDM has not explained its failure to record its judgment during that interval.

In response to the "relation-back" argument under 77 Ill. Rev. Stat. §2, the court stated:

> We cannot accept MJDM's argument, for Section 2 is a provision which tolls the seven-year statute of limitations on liens and executions (Section 6 of Chapter 77) while a stay of execution is in effect. Section 2 regulates the length of time for which one is entitled to a judgment lien or execution but has nothing to do with the time at which a judgment lien is created. Because Sections 1 and 2 are separate statutory provisions governing the time and manner of creating a judgment lien (Section 1) and the duration thereof (Section 2), MJDM's relation back argument is without merit.
>
> To conclude, the trustee's lien was valid against Hamilton's property as of December 9, 1964. Being perfected, thereafter, any lien of MJDM was null and void as against the trustee in bankruptcy. We realize that this means MJDM will be an unsecured creditor. However, its remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of judgment in the breach of contract case against Hamilton,

> Equitable relief may not be awarded now to afford MJDM a remedy at the expense of other Hamilton creditors.

Consequently, MJDM was afforded the status of an unsecured creditor in the bankruptcy proceedings and allowed only a fraction of its $107,587.06 judgment (reduced to the sum of $60,261.77 by remittitur filed January 22, 1965).

STATEMENT OF THE M.J.D.M. TRUCK RENTALS, INC., ET AL. v. O'BRIEN CASE

M.J.D.M. Truck Rentals, Inc. commenced a legal malpractice action in the U.S. District Court of the Northern District of Illinois, Eastern Division, based upon diversity of citizenship, against its former attorney, William J. O'Brien, Jr., an Illinois resident, for negligently failing to promptly record a federal judgment it had recovered against Hamilton Steel Products, Inc., for the purpose of creating a lien on Hamilton's real estate prior to the institution of bankruptcy proceedings by Hamilton.

A jury verdict on the issue of liability was returned against O'Brien and on February 28, 1974, judgment was entered in favor of MJDM and against O'Brien in the amount of $47,093.31.

MJDM appealed from the judgment on the issue of damages. O'Brien appealed on the issue of liability arguing that the June 3, 1964 judgment could not have supported an effective lien because there was no time when the judgment was both final and subject to execution.

On August 26, 1975, the Seventh Circuit Court of Appeals, Pell, Stevens and Tone, Circuit Judges, reversed the February 28, 1974 judgment of the District Court.

The opinion written by John Paul Stevens, Circuit Judge, states on page 4, paragraph 3:

> From June 3 to June 13, execution was stayed automatically by virtue of Rule 62(a), and during the period after June 23, execution was stayed by order of the district court . . . any recording while a stay of execution was in effect would not have created a valid lien . . . .

and in paragraph 4 (including footnote 5):

> During the period after June 12, 1964, when Hamilton's motion for a new trial was filed, the judgment lacked finality. As Professor Moore has explained: 'If any such motion [including a motion for a new trial under F.R.C.P. 59(b)] is timely made, the judgment ceases to be final until the motion is disposed of'. J. Moore, Federal Practice paragraph 110.08[3], at 120-121 (1973). Thus, the June 3 judgment became interlocutory upon the filing of the new trial motion on June 12 . . . it did not become final until after the remittitur was filed and the motion for a new trial denied on January 22, 1965.

The Court thus concludes at page 5:

> It follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy, and that the district court erred in failing to grant his motion for a directed verdict. Reversed.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PELL, STEVENS, AND TONE, CIRCUIT JUDGES, HAS RENDERED A DECISION IN CONFLICT WITH THE APRIL 10, 1967 DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, KNOCH, FAIRCHILD, AND CUMMINGS, CIRCUIT JUDGES, ON THE ISSUE OF WHETHER OR NOT A STAY OF EXECUTION ORDER ENTERED IN THE DISTRICT COURT PREVENTS THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY LOCATED IN ILLINOIS UNDER ILLINOIS LAW.

The April 10, 1967 Cummings opinion stated that MJDM's lien was valid on March 12, 1965, and that the "creation of a judgment lien and an execution are considered separate incidents. In sum, nothing in the June 23, 1964 order prevented MJDM from recording its judgment . . . its remedy was to have promptly recorded its lien or to have obtained security when the District Court stayed execution . . . . Moreover, there was no stay order in effect between June 13, 1964 and June 23, 1964."

The August 26, 1975 Stevens opinion stated that "any recording while a stay of execution was in effect would not have created a lien . . . it follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy."

The existence of such a conflict in the Seventh Circuit involves an important and recurrent issue on which this court should grant certiorari in order to bring uniformity within the circuit.

2. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION RESPECTING THE FINALITY OF A JUDGMENT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Rules 58 and 79 F.R.C.P. provide that every judgment is effective only when set forth on a separate document and entered by the Clerk in the civil docket book. Thus, upon its entry by the Clerk on June 3, 1964, MJDM's judgment became final.

The statement of the Court of Appeals that "when Hamilton's Motion for a New Trial was filed, the judgment lacked finality" and "thus . . . became interlocutory . . ." is supported only by the authority of the statement of J. Moore, Federal Practice, paragraph 110.08[3] pp. 120-121 (1973).

The statement of Professor Moore that "If any such motion is timely made, the judgment ceases to be final until the motion is disposed of" is out of context. A reading of the entire context in which the statement is made makes it clear that Professor Moore is referring only to the *computation of time* for the purpose of conferring jurisdiction on the appellate court as prescribed by 28 U.S.C. §§ 1291 and 2107. (Rule 4, F.R.A.P. provides that the running of the time for filing a notice of appeal is computed from the entry of the judgment in the civil docket, is terminated by a timely motion filed in the district court and commences to run and is to be computed from the entry of the order made upon the motion.) There is no implication by Mr. Moore that the filing of a post trial motion has any effect whatsoever on the finality of a judgment as it respects the creation of a federal judgment lien under 28 U.S.C. 1962 and 77 Ill. Rev. Stat. §§ 69 and 69a.

The fact that Mr. Moore distinguishes between finality upon compliance with Rules 58 and 79 F.R.C.P. and finality for the particular purpose of time for appeal is patently clear in his own language which this court adopted in *United States* v. *Indrelunas,* 411 U.S. 216, 93 S. Ct. 1562 (1973), where the Court stated:

> The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment. See Notes of Advisory committee following Fed. Rule Civ. Proc. 58, reported in 28 U.S.C. Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. See, e.g., *United States* v. *F. & M. Schaefer Brewing Co.,* 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed. 2d 721 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.
>
> Professor Moore makes the following cogent observation with respect to the purpose of the separate-document provision of the rule:
>
> > This represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing, inter alia, on the *time for appeal* (emphasis added) and the making of post-judgment motions that go to the finality of the judgment for *purposes of appeal.* (emphasis added) 6A J. Moore, Federal Practice, paragraph 58. 94[4.2], at 58-161 (1972).

The decision of the court of appeals in deciding the question of finality, is in direct conflict with the unequiv-

ocal language of Rules 58 and 79 F.R.C.P. and the policy of this court to eliminate uncertainty (*see Indrelunas, supra*) and the consideration to be given against the danger of denying justice by delay. *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 85, S.Ct. 308; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221; *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 70 S.Ct. 322.

MJDM's cause of action against Hamilton merged into the judgment duly entered in the district court on June 3, 1964. All MJDM's rights in the judgment vested on that date, including the immediate right to have the satisfaction of its judgment secured by the creation of a judgment lien on Hamilton's real estate.

The holding of the court of appeals that the finality and effective date of MJDM's judgment was delayed from June 3, 1964, until January 22, 1965, results in a complete denial of justice to MJDM. MJDM has not only lost the benefit of its federal judgment, but has lost its cause of action against its attorney for negligently failing to record the judgment prior to Hamilton's bankruptcy.

3. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATE QUESTION RESPECTING THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY LOCATED IN ILLINOIS IN CONFLICT WITH APPLICABLE STATE LAW.

77 Ill. Rev. Stat. §69 provides that federal judgments may be recorded in the public offices of the state so as to make them conform to the rules and requirements relating to the judgments of the courts of Illinois. 77 Ill. Rev. Stat. §69a provides that upon filing with the Office of the Recorder of Deeds, the judgment shall become a lien in like manner as a judgment of the courts of Illinois.

77 Ill. Rev. Stat. §1 provides that with respect to the creation of a judgment lien, the judgment shall be a lien *only* from the time it is recorded.

MJDM's judgment created a lien on Hamilton's real estate on March 12, 1965, the date O'Brien recorded it. Had he recorded it on any date prior to the date of the trustee's lien, it would have created a lien as of that date and would have been satisfied from the bankruptcy estate. The June 3, 1964 automatic stay of execution order would not have prevented it from becoming an effective lien, nor would the June 23, 1964 stay of execution order have destroyed it.

77 Ill. Rev. Stat. §2 makes it clear that while a stay of execution is in effect, only the 7 year time limitation for computing the duration of the lien is affected. When a judgment is rendered and its execution is restrained, the judgment remains in full force. See *Curtis* v. *Root*, 28 Ill. 367 (1862), where the Illinois Supreme Court stated at page 337:

> The appeal did not vacate or destroy the lien of the judgment. It merely suspended its execution. It was in full force all the time, as a vital judgment of the court.

Two further points in the *Stevens* opinion warrant consideration by this court: *one*, As the *Cummings* opinion noted, O'Brien offered no explanation for his failure to record the judgment during the June 13, 1964-June 23, 1965 interval when no stay order was in effect. The *Stevens* opinion offers no legal explanation why the lien could not have been created during this period under Illinois law; and *two*, None of the cases cited by the court, *Noe* v. *Moutray*, 170 Ill. 169, 177, 48 N.E. 709, 712

(1897); *City of Chicago* v. *Hall*, 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell*, 298 Ill. App. 434, 440, 19 N.E.2d 111, 114 (1939), support the proposition for which they are cited.

Your Petitioners respectfully submit that the decision of the court of appeals that "any recording while a stay of execution order was in effect would not have created a valid lien" is in direct conflict with the clear unequivocal language of the Illinois Revised Statutes and the applicable decisions of the state of Illinois. *Reconstruction Finance Corp.* v. *Maley*, 125 F.2d 131, 133 (7th Cir. 1942); *In re Lake County Fuel and Supply Co.*, 70 F.2d 391 (7th Cir. 1934); *Holmes* v. *Fayno*, 326 Ill. App. 624, 63 N.E. 2d 249 (2d Dist. 1945)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

.....

ALBERT H. BEAVER,
Attorney for Petitioners

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 73-2007
THEMIS N. ANASTOS and HUGH M. MATCHETT, etc.,
Petitioners-Appellants,

v.

M.J.D.M. TRUCK RENTALS, INC., et al.,
Respondents-Appellees.

No. 74-1440
THEMIS N. ANASTOS and HUGH M. MATCHETT, etc.,
Petitioners-Appellants,

v.

WILLIAM J. O'BRIEN,
Respondent-Appellee.

No. 74-1441
M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania Corporation, and WILLIAM V. DEMAIO,
Plaintiffs-Appellants,

v.

WILLIAM J. O'BRIEN,
Defendant-Appellee,

No. 74-1442
M.J.D.M. TRUCK RENTALS, INC., et al.,
Plaintiffs-Appellees,

v.

WILLIAM J. O'BRIEN,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division—No. 69 C 1304 JAMES B. PARSONS, *Judge.*

ARGUED APRIL 9, 1975 — DECIDED AUGUST 26, 1975

Before PELL, STEVENS and TONE, *Circuit Judges.*

STEVENS, *Circuit Judge.* This is a malpractice action brought by a successful plaintiff against its former trial counsel for failing to perfect a judgment lien on the defendant's realty before the defendant commenced bankruptcy proceedings. The jury returned a verdict against the attorney. He appeals, arguing that as a matter of Illinois law the judgment in the underlying case could not have supported an effective lien because there was no time prior to the bankruptcy when the judgment was both final and subject to execution. Since we agree that recording the judgment would not have perfected a lien, the failure to do so breached no duty owed by the attorney to the plaintiff and caused the plaintiff no harm. We therefore reverse without finding it necessary to discuss the other points argued by appellant, the plaintiff's claim that the damage award should have been higher, or the contentions of the petitioners-appellants who sought leave to intervene in order to share in the recovery.

William J. O'Brien, the defendant in this malpractice action, represented the plaintiff in an action against Hamilton; that litigation is described in some detail in our opinion in *Hamilton Steel Products, Inc.* v. *Yorke,* 376 F.2d 463 (7th Cir. 1967). For present purposes we need repeat only the essential chronology.

On June 3, 1964, the district court entered a judgment of $107,587 in favor of plaintiff and against Hamilton; under Rule 62(a), Fed.R.Civ.P., all proceedings to enforce the judgment were automatically stayed for ten days. Within that ten day period, on June 12, 1964, Hamilton filed a motion for a new trial and a motion for a stay of execution.[1] On June 23, 1964 the district court took the motion

[1] In our prior opinion we incorrectly stated that the motion was filed on June 23, 1964 (see 376 F.2d at 464); the reference to an incorrect date did not affect the disposition of that appeal, but is critical on this appeal.

for a new trial under advisement and granted the stay of execution "until 10 days after ruling on motion for new trial." On January 22, 1965 plaintiff filed a remittitur reducing the judgment to $60,261, and the motion for a new trial was denied. By its terms, the stay of execution expired ten days later.

In the meantime, on December 9, 1964 Hamilton had commenced proceedings under the bankruptcy act which in due course resulted in an adjudication of bankruptcy and a sale of Hamilton's real estate. The plaintiff was thereby deprived of substantially the entire benefit of its judgment, a consequence which could have been avoided if a valid lien had been perfected prior to August 9, 1964, a date four months before Hamilton commenced bankruptcy proceedings.[2] The alleged malpractice consists of O'Brien's failure to perfect a lien on Hamilton's real estate prior to August 9, 1964.[3] His actions on behalf of the plaintiff subsequent to that time are not relevant on this appeal since we have already decided that he

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[2] *See* 11 U.S.C. § 107(a)(1).

[3] As we explained in *Hamilton Steel Products*:

> Section 1962 of the Judicial Code provides that every judgment rendered by a District Court within a State shall be a lien on the property in that State as provided by the law of the State (28 U.S.C. § 1962). The necessary reference to the governing Illinois statute provides that a judgment of a court of the United States shall become a lien upon the real estate of the person against whom the judgment is rendered upon filing a copy of the judgment in the office of the county recorder of deeds (Ill. Rev. Stats. 1965, c. 77, § 69a). Under these two provisions, it is clear that MJDM's judgment could not be perfected into a valid lien until it was filed with the Recorder of Deeds of Cook County. That was not done until March 12, 1965, long after the date of bankruptcy." 376 F.2d at 465.

did not succeed in perfecting a lien which related back to the date of the original judgment.[4]

There is no dispute about the fact that O'Brien did not record the plaintiff's judgment until after August 9, 1964. He argues, however, that an earlier recording would not have created a lien on Hamilton's real estate; therefore, he had no professional obligation to record the judgment earlier and, as a matter of law, is not guilty of malpractice.

In order to create a lien on real estate, in Illinois, a recorded judgment "must possess two qualifications: *first*, it must be final and for a definite sum; and *second*, it must be such a judgment that execution may issue thereon." *Noe* v. *Moutray*, 170 Ill. 169, 177, 48 N.E. 709, 712 (1897). See also, *City of Chicago* v. *Hall*, 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell*, 298 Ill. App. 434, 440, 19 N.E.2d 111, 114 (1939); R. Kratovil & F. Harrison, Jr., "Enforcement of Judgments Against Real Property," 1951 U. of Ill. L. Forum 1, 2; 1 Black on Judgments § 407 (1902); 2 Freeman on Judgments §§ 929, 930 (1925).

The question, then, is whether there was any time prior to August 9, 1964 when plaintiff's judgment was both final and executable.

From June 3 to June 13, execution was stayed automatically by virtue of Rule 62(a), and during the period

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[4] In our opinion in *Hamilton Steel Products, Inc.* v. *Yorke*, 376 F.2d 463, we noted that since there had been no recording of the judgment prior to December 9, 1964, there was no basis for a conclusion that a subsequent recording might effectively relate back to the date of the original judgment. It is now clear from our examination of the record and the pertinent Illinois authorities that there would have been no relation back of an effective lien even if an earlier recording had been made. In other words, our decision on the prior appeal is supportable for a reason in addition to that upon which we relied in that opinion.

after June 23, execution was stayed by the order of the district court. Plaintiff is correct in pointing out that neither of those stays of execution prevented O'Brien from recording the judgment; but if no valid purpose would have been served by recording the judgment, the failure to do so cannot constitute malpractice. Since any recording while a stay of execution was in effect would not have created a valid lien, our inquiry narrows to the interval between June 13 and June 23 when no stay of execution was in effect.

During the period after June 12, 1964, when Hamilton's motion for a new trial was filed, the judgment lacked finality,[5] it did not become final until after the remittitur was filed and the motion for new trial denied on January 22, 1965.

Thus, at no time between June 3, 1964, and February 2, 1965, was the judgment against Hamilton both executable and final. It follows that no judgment lien could have arisen at the time of recording had O'Brien recorded the judgment during that period. Nor, under Illinois law, would such a lien, which could first attach on February 2, 1965, have been related back to the date of an earlier ineffective recording. In *Lehman* v. *Cottrell, supra,* the court explained that when the deficiencies preventing attachment of a judgment lien are removed, the lien arises as of that date, and does not relate back to any earlier

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[5] As Professor Moore has explained:

"If any such motion [including a motion for a new trial under Fed.R.Civ.P. 59(b)] is timely made, the judgment ceases to be final until the motion is disposed of."

9 J. Moore, Federal Practice ¶110.08[3], at 120-121 (1973). Thus, the June 3 Judgment became interlocutory upon the filing of the new trial motion on June 12. An interlocutory order cannot give rise to a judgment lien. 1 Black on Judgments § 408; 2 Freeman on Judgments § 929.

time. 298 Ill. App. at 443.[6] *See also* 1 Black on Judgments § 408, at 644; 2 Freeman on Judgments § 929, at 1957.

It follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy and that the district court erred in failing to grant his motion for a directed verdict.

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[6] At the time of the decision in *Lehman*, Illinois law did not require that a judgment be recorded to create a lien against real property of the judgment debtor located in the county of the court rendering the judgment. The recording requirement herein involved was added by the Act of August 9, 1963, Laws 1963, p. 2678, §1. *See* S.H.A. ch. 77, §1, Historical Note (1966). Such a requirement cannot have been intended by the General Assembly to affect the other prerequisites for the creation of a valid judgment lien, however, because the recording of judgments had been required in Illinois since 1889 in order to create a lien on real estate located in counties other than that of the court that returned the judgment. *Id. Noe* and *Lehman, supra,* wherein the requirements of finality and executability are discussed, were both decided after this 1889 act. Thus, the 1963 amendment merely expanded the theretofore existing recording requirement to the county of the court rendering the judgment.

It follows that when a judgment lacking one or both of the requirements to create a lien is recorded, and the deficiencies are subsequently remedied, the lien attaches as of this latter date, at the earliest, and does not relate back to the date of recording. In other words, a recording puts third parties on notice as to the possible existence of an encumbrance, but does not create any lien prior to the time that other requirements for such a lien have been satisfied.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

No. 15829

In THE MATTER OF HAMILTON STEEL PRODUCTS, INC., M.J.D.M. TRUCK RENTALS, INC.,

Appellant,

v.

NATHAN YORKE, Trustee in Bankruptcy of the Estate of HAMILTON STEEL PRODUCTS, INC.,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 10, 1967

Before KNOCH, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Hamilton Steel Products, Inc. ("Hamilton") was an Illinois corporation organized in 1933, with its principal place of business in Chicago, Illinois. It was a manufacturer of garden equipment and children's toys.

July 8, 1960, M.J.D.M. Truck Rentals, Inc. ("MJDM"), a Pennsylvania corporation with its principal place of business in Glen Mills, Pennsylvania, filed a District Court breach of contract suit against Hamilton, seeking damages for rental of tractors and trailers by MJDM to Hamilton. On June 3, 1964, a jury verdict was rendered in favor of MJDM for $107,587, and judgment was entered on the verdict. Under Rule 62(a) of the Federal Rules of Civil Procedure, all proceedings to enforce the judgment were automatically stayed until June 13, 1964.

On June 23, 1964, Hamilton filed a motion for stay of execution, a motion for judgment notwithstanding the verdict, and a motion for a new trial. On that date, the District Court denied Hamilton's motion for judgment notwithstanding the verdict and took under advisement the motion for a new trial. At the same time, the District Court ordered "execution of judgment stayed until 10 days after ruling on motion for new trial". On January 22, 1965, Hamilton's motion for a new trial was denied upon MJDM's filing a remittitur reducing its judgment to $60,261.

On December 9, 1964, alleging insolvency, Hamilton filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (11 USC § 701 *et seq.*), but Hamilton retained possession of its assets and continued the operation of its business. The referee in bankruptcy simultaneously stayed any suits against Hamilton, after finding that Hamilton was then in default in payment of debts aggregating $1,000,000.

On February 19, 1965, Hamilton withdrew its arrangement petition and consented to be adjudged a bankrupt under the Bankruptcy Act (11 USC § 1 *et seq.*). On the same date, Nathan Yorke was appointed trustee in bankruptcy.

On February 26, 1965, the bankruptcy trustee was authorized to offer Hamilton's real estate for sale on

March 15, 1965. In the order authorizing the sale, the referee directed all persons asserting liens against the real estate to show cause why it should not be sold free of any encumbrances. MJDM was given notice of this order but did not appear at the March 12th hearing on the rule to show cause. However, without notice to the bankruptcy trustee, on that date MJDM filed with the Recorder of Deeds of Cook County, Illinois, a copy of its reduced judgment. The judgment was duly recorded.

Hamilton's real estate was sold on March 16, 1965, in open court for the sum of $327,000 free of all encumbrances. On April 14, 1965, the bankruptcy trustee filed a motion for summary judgment, asking the referee for an order declaring that MJDM's purported lien for $60,261 be declared null and void.

Title and possession of Hamilton's real estate were transferred by the bankruptcy trustee to the purchaser on May 3, 1965. On December 3, 1965, the trustee's motion for summary judgment was sustained by the referee and MJDM's purported judgment lien was declared null and void. The bankruptcy court affirmed the referee's order and this appeal followed.

The sole issue is whether MJDM's judgment became a lien on Hamilton's real estate superior to the bankruptcy trustee's. We agree with the bankruptcy court's conclusion that MJDM's purported lien was null and void.

MJDM first contends that the mortgaging of Hamilton's properties was fraudulent and deceitful. Nothing in this record shows that the mortgages were to avoid paying the judgment obtained by MJDM. The July 17, 1964, mortgage antedated the December 9, 1964, Chapter XI petition by almost five months and therefore was beyond the period prescribed by Sections 60 and 67 of the Bankruptcy Act (11 USC §§ 96 and 107). The October 15, 1964, mortgage was of course within four months preceding the Chapter XI petition and therefore may be a voidable preference (*idem.*). To avoid being surcharged, it is to be

presumed that the bankruptcy trustee, who represents all creditors, will raise any tenable objections to the mortgages in the bankruptcy court.[1] Any improprieties in the mortgages would affect all unsecured creditors equally.

Similarly, there is nothing in this record to show that the Chapter XI petition was filed in bad faith to avoid MJDM's judgment. Instead, the record shows that at the time of filing the Chapter XI petition, Hamilton's debts aggregated $1,000,000, resulting in Hamilton's insolvency.

At the time of these proceedings, Section 70c of the Bankruptcy Act provided as follows (11 USC § 110(c)):

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed, vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

This provision was enacted in 1910 to give the bankruptcy trustee "all the rights of an ideal judicial lien creditor". *Lewis* v. *Manufacturers National Bank of Detroit*, 364 U.S. 603, 605; 4 Collier on Bankruptcy (14th ed. 1964) pp. 1410-1434.

Under Section 70c, the trustee's rights as an ideal lien creditor vest "at the date of bankruptcy". That date means "the date when the petition was filed".[2] In turn, "petition" is defined as "a document filed in a court of bankruptcy * * * initiating a proceeding under this Act".[3] Another provision of the Bankruptcy Act makes

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[1] See 11 USC §§75(a)(8) and 96 (b).

[2] See Section 1(13) of the Bankruptcy Act (11 USC § 1(13).

[3] See Section 1(24) of the Bankruptcy Act (11 USC § 1(24).

it clear that where, as here, a proceeding under Chapter XI is succeeded by bankruptcy, the proceeding shall be conducted "as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter [XI] was filed".[4] By virtue of these provisions, the date of bankruptcy in this case was December 9, 1964.

Section 1962 of the Judicial Code provides that every judgment rendered by a District Court within a State shall be a lien on the property in that State as provided by the law of the State (28 USC § 1962). The necessary reference to the governing Illinois statute provides that a judgment of a court of the United States shall become a lien upon the real estate of the person against whom the judgment is rendered upon filing a copy of the judgment in the office of the county recorder of deeds (Ill. Rev. Stats. 1965, c. 77, §69a). Under these two provisions, it is clear that MJDM's judgment could not be perfected into a valid lien until it was filed with the Recorder of Deeds of Cook County. That was not done until March 12, 1965, long after the date of bankruptcy.

Under the Bankruptcy Act, the bankruptcy trustee had acquired the status of a lien creditor on December 9, 1964. Since MJDM's judgment did not become a lien until March 12, 1965, that lien is null and void as against the trustee. *United States* v. *Speers,* 382 U.S. 266, 275; *In re Goodwin*, 87 F.2d 468, 470 (7th Cir. 1937); *In re Lustron Corp.,* 184 F.2d 789, 794 (7th Cir. 1950), certiorari denied, 340 U.S. 946.

To rebut these authorities MJDM argues that the June 23, 1964, order (entered in the breach of contract action) staying execution of the June 3, 1964, judgment in MJDM's favor restrained it from recording that judgment. However, the order merely provided "execution of judgment stayed until 10 days after ruling on motion

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[4] See Section 378 of the Bankruptcy Act (11 USC § 778(2)).

for new trial". The stay order did not prevent MJDM from recording its judgment. Execution of judgment would result in the transfer of property from Hamilton to MJDM to satisfy its judgment. Recording this judgment would not be execution because it does not result in any transfer of property. Recording would not affect any judgment creditor rights of MJDM against Hamilton; rather it would determine MJDM's position vis-à-vis others with claims on Hamilton's assets. Therefore, the stay of execution did not prevent MJDM from recording, nor could MJDM have reasonably thought so. In Illinois, a judgment lien and execution on a judgment are different things. *Reconstruction Finance Corporation* v. *Maley,* 125 F.2d 131, 133 (7th Cir. 1942) recognizes this difference. There the plaintiff recorded a transcript of his judgment in Knox County, Illinois, and this Court observed:

> "• • • plaintiff, by the filing of such transcript, acquired a lien upon the debtor's real estate in Knox County. No execution was issued upon such transcript • • •"[5]

In other words, the creation of a judgment lien and an execution are considered separate incidents.

In sum, nothing in the June 23, 1964, stay order prevented MJDM from recording its judgment. Moreover, there was no stay order in effect between June 13, 1964, and June 23, 1964. MJDM has not explained its failure to record its judgment during that interval.

Chapter 77 Illinois Revised Statutes (1965) Section 1 provides that "a judgment shall be a lien • • • only from the time" of recording. MJDM argues that the effect of Section 2 of this Chapter is to make the effective date of its "lien" relate back to June 23, 1964, when the stay of execution was entered by the District Court

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[5] To the same effect, see *In re Lake County Fuel & Supply Co.,* 70 F.2d 391 (7th Cir. 1934); *Holmes* v. *Fanyo,* 326 Ill.App. 624, 63 N.E.2d 249 (2d Dist. 1945).

in the breach of contract suit. Section 2 provides that "when the party in whose favor a judgment is rendered is restrained * * * from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned" in Section 1. We cannot accept MJDM's argument, for Section 2 is a provision which tolls the seven-year statute of limitations on liens and executions (Section 6 of Chapter 77) while a stay of execution is in effect. Section 2 regulates the length of time for which one is entitled to a judgment lien or execution but has nothing to do with the time at which a judgment lien is created. Because Sections 1 and 2 are separate statutory provisions governing the time and manner of creating a judgment lien (Section 1) and the duration thereof (Section 2), MJDM's relation back argument is without merit.

To conclude, the trustee's lien was valid against Hamilton's property as of December 9, 1964. Being perfected thereafter, any lien of MJDM was null and void as against the trustee in bankruptcy. We realize that this means MJDM will be an unsecured creditor. However, its remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of judgment in the breach of contract case against Hamilton. Equitable relief may not be awarded now to afford MJDM a remedy at the expense of other Hamilton creditors.[6]

The judgment of the District Court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 23, 1975

Before

Hon. Wilbur F. Pell, Jr. *Circuit Judge*
Hon. John Paul Stevens, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

* * (Caption—Civil No. 69 C 1304) * *

ORDER

Having considered the petition for rehearing filed on behalf of M.J.D.M. Truck Rentals, Inc., on September 9, 1975, the suggestion of party for rehearing *en banc* filed by said party on said date, and the petition for rehearing of third persons not party of record filed on September 22, 1975, and no judge in regular active service having voted in favor of rehearing *en banc,* the aforesaid petitions and suggestion are denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

September 30, 1975

Before

Hon. John Paul Stevens, *Circuit Judge*

* * (Caption—Civil No. 69 C 1304) * *

This matter comes before the Court on the "Motion For Leave To File Brief In Support Of Suggestion Of Party For Rehearing In Banc And For Reconsideration Of September 23, 1975 Order Denying Suggestion Of Party For Rehearing In Banc And Denying Petition For Rehearing" filed herein by attorney for M.J.D.M. Truck Rentals, Inc. On consideration whereof,

It Is Hereby Ordered that said motion be, and the same, is hereby Denied.

Supreme Court, U. S.
FILED
JAN 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-866

M.J.D.M. TRUCK RENTALS, INC., AND
WILLIAM V. DEMAIO,

Petitioners,

vs.

WILLIAM J. O'BRIEN,

Respondent.

No. 75-887

THEMIS N. ANASTOS AND
HUGH M. MATCHETT,

Petitioners,

vs.

WILLIAM V. DEMAIO AND M.J.D.M.
TRUCK RENTALS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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TRUCK RENTALS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner, M.J.D.M. Truck Rentals, Inc. ("M.J.D.M."), instituted suit against Hamilton Steel Company ("Hamilton") in 1960 for unpaid truck rentals. *M.J.D.M. Truck Rentals Inc.*

v. *Hamilton Steel Products, Inc.*, No. 60 C 1089. After trial, a judgment was entered for petitioner, execution of which was automatically stayed for ten days, pursuant to F. R. C. P. 62(a). Within that ten day period, Hamilton moved for a new trial. Ten days after the expiration of the automatic ten day stay period, execution on the judgment was stayed by court order. The judgment was subsequently modified by the trial court.

Recordation of the judgment is a step in perfecting a judgment lien in Illinois. M.J.D.M.'s judgment against Hamilton was recorded when the stay order was lifted. However, Hamilton had previously filed under the bankruptcy act and the trustee sought to avoid the lien. In 1967, the Court of Appeals for the Seventh Circuit reviewed the validity of M.J.D.M.'s lien against Hamilton and concluded that it was not valid because no judgment was recorded prior to Hamilton's bankruptcy. *Hamilton Steel Products Co.* v. *Yorke*, 376 F. 2d 463 (7th Cir. 1967).

Three years after the Seventh Circuit's decision M.J.D.M. brought a malpractice action against its former attorney, W. J. O'Brien, for failure to record the judgment. After a verdict in M.J.D.M.'s favor, the Seventh Circuit reversed. Going a step beyond its analysis on the first occasion M.J.D.M. was before it, the Seventh Circuit concluded that, even if the judgment had been recorded, a valid lien under Illinois law would not have been created. The Seventh Circuit, therefore, held that the District Court should have entered a directed verdict for O'Brien in the malpractice action since M.J.D.M. suffered no harm as a result of O'Brien's action in not recording the judgment.[1]

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1. In addition to the petition filed by M.J.D.M., two of M.J.D.M.'s former council also seek review. Although the petition filed by Anastos and Matchett is virtually incomprehensible, it appears to seek review of Anastos and Matchett's right to intervene to protect claims for legal fees.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Seventh Circuit correctly decided that Illinois law requires that a judgment be (1) final and (2) executable if it is to form the basis for an enforceable judgment lien.

2. Whether the courts below correctly denied the petitions to intervene of Anastos and Matchett.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict in the Decisions of the Seventh Circuit on Any Issue Presented by This Case.

The decision appealed from involves only the narrow application of long-standing Illinois Supreme Court precedent relating to judgment liens. No amount of strained interpretation can convert this into a substantive federal question. Because this case involves only Illinois law, petitioners are obviously unable to find any conflict among the circuit court decisions. Therefore, they have been reduced to asserting the unique argument that certiorari should be granted because there is a conflict between two decisions of the Seventh Circuit relating to Illinois judgment liens. In support of this assertion they cite *Hamilton Steel Products Co.* v. *Yorke*, 376 F. 2d 463 (7th Cir. 1967) and *M.J.D.M. Truck Rentals, Inc.* v. *O'Brien*, 521 F. 2d 1301 (7th Cir. 1975). The petitioners' assertion to the contrary notwithstanding, the Seventh Circuit has indicated that there is no conflict in the holdings of these two cases. See Petition of M.J.D.M. at 4a, fn. 4.

The 1967 case dealt with whether the Federal District Court's order staying execution on the judgment in *M.J.D.M. Truck Rentals* v. *Hamilton Steel Products* had "restrained" M.J.D.M. from recording the judgment against Hamilton. M.J.D.M.

argued that it did, and that therefore the bankruptcy laws should not be applied so as to invalidate the lien of judgment against Hamilton. The court held the stay of execution did not prohibit M.J.D.M. from recording the judgment and that the bankruptcy laws prevented M.J.D.M. from perfecting a judgment lien against the property.

In addition to ruling on the issues presented, the Seventh Circuit in 1967 made several gratuitous statements which have become the underpinnings for the petitioners' argument. The petitioners make much of dicta in the last paragraph of the opinion in *Hamilton* v. *Yorke*, expressing the court's feeling that the judgment should have been recorded. It is abundantly clear from the opinion that the court was not asked to decide whether the judgment, if recorded, would have created a lien. Such an issue was not relevant to the controversy before the court and cannot be said to be any part of the holding of that case.

M.J.D.M. Truck Rentals, Inc. v. *O'Brien*, on the other hand, dealt with whether a judgment, if recorded prior to Hamiltons bankruptcy, would have created a judgment lien. The court, applying Illinois precedent, held it would not because at no time before Hamilton filed for bankruptcy did M.J.D.M.'s judgment possess the necessary requirements of *finality* and *executability*.

2. The Decision of the Seventh Circuit Is Clearly Correct.

After a searching examination of the Illinois precedent dealing with judgment liens, the Seventh Circuit found that to support a lien on real estate in Illinois a recorded judgment must be final and executable. *Noe* v. *Moutray*, 170 Ill. 169, 177, 48 N. E. 709, 712 (1897). See also, *City of Chicago* v. *Hall*, 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell*, 298 Ill. App. 434, 440, 19 N. E. 2d 111, 114 (1939); R. Kratovil & F. Harrison, Jr., "Enforcement of Judgments Against Real Property," 1951 U. Ill. L. F. 1, 2; 1 Black on Judgments, § 407 (1902); 2

Freeman on Judgments, §§ 929, 930 (1925). Petitioners are unable to cite any case which overturns these authorities.[2]

Citing 9 J. Moore, Federal Practice ¶ 110.08[3] at 120-21 (1973), the Seventh Circuit then found that while post-trial motions were pending, from June 12, onward, the judgment lacked the requisite finality. Petitioners do not challenge the accuracy of Professor Moore's conclusions. Instead, they assert the Seventh Circuit misread Professor Moore. Apparently arguing that a judgment may be "final" for some purposes and not for others, petitioners claim that the cited paragraph refers "only to the *computation of time* for the purpose of conferring jurisdiction on the appellate court . . .". (Petition for Petitioner, M.J.D.M., at 15) (emphasis in original). This simply is not what Professor Moore says.[3]

Even if the petitioners' contention that this section of Professor Moore's treatise was misused is correct, they would gain nothing. They can find no support for their primary assertion that an Illinois judgment may be final for purposes of creating a lien and interlocutory for other purposes. Illinois law requires that a judgment sufficient to give rise to a lien must be a final judgment. It does not seek to distinguish between the various factors contributing to the lack of finality. Nor does it seek to distinguish between different types of final judgments.

At the conclusion of their argument, petitioners cite *Reconstruction Finance Corp.* v. *Maley,* 125 F. 2d 131, 133 (7th Cir. 1942); *In re Lake County Fuel and Supply Co.,* 70 F. 2d 391 (7th Cir. 1934); *Holmes* v. *Fanyo,* 326 Ill. App. 624, 63 N. E. 2d 249 (2d Dist. 1945), as being in conflict with the Seventh Circuit's holding that "any recording while a stay of execution order was in effect would not have created a valid lien." The kindest thing that may be said in response to this is

2. They cite *Curtis* v. *Root,* 28 Ill. 367 (1862). To the extent that case may be relevant, it has been implicitly overruled by the cases cited above.

3. See 9 J. Moore, Federal Practice ¶ 110.08[3] at 120 fn. 2 (1973).

that these cases do not deal with any issue raised in the present case. These cases deal with the time a judgment lien will remain in effect pursuant to Illinois Revised Statutes Ch. 77 § 1 (1973).

3. Petitioners Anastos and Matchett Have No Interest in This Appeal.

Petitioners Anatos and Matchett were denied leave to intervene by the District Court and the Circuit Court of Appeals. They have filed a brief raising a number of issues relating to the merits of Judge Stevens' decision, as well as the denial of their petition to intervene. Some of the issues raised by these petitioners have already been raised by M.J.D.M. and have been discussed *supra*. However, as a matter of law, petitioners Anastos and Matchett are precluded from raising any issues except the denial of their petition to intervene. See, *United Auto Workers* v. *Scofield*, 382 U. S. 205, 209 (1965); R. Stern & E. Grossman, Supreme Court Practice, 282-83 (4th Ed. 1969) (and cases cited therein).

Petitioners assert a right to intervene to protect a claimed statutory lien on the judgment in *this case*. Petitioners are unable to state how that alleged statutory lien arose. Indeed, their assertion is totally unsupported by any authority.

For the foregoing reasons, respondent respectfully submits that the petitioners have failed to raise any important federal question appropriate for resolution by this Court. The petitions should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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In the
Supreme Court of the United States
October Term, 1975

M.J.D.M. TRUCK RENTALS, INC., and
WILLIAM V. DEMAIO,

Petitioners,

vs.

WILLIAM J. O'BRIEN,

Respondent.

REPLY BRIEF TO ARGUMENTS FIRST RAISED IN BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

M.J.D.M. TRUCK RENTALS, INC., and
WILLIAM V. DEMAIO,

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1. PETITIONER'S REPLY TO ARGUMENT OF RESPONDENT RESPECTING THE FINALITY OF A FEDERAL JUDGMENT.

William J. O'Brien, Respondent herein, makes the conclusory statement that the decision appealed from involves only Illinois law and "that no amount of strained interpretation can convert this into a substantial federal question" (Brief in Opp. p. 3). Respondent completely ignores the key finding of the August 26, 1975 *Stevens* Opinion, "thus, the June 3 Judgment became interlocutory upon the filing of the new trial motion on June 12" (Pet. for Cert. p. 5a, fn. 5).

This finding, respecting the conversion of a final federal judgment into an interlocutory judgment upon the mere filing of a post trial motion, is unquestionably a federal issue going to the very essence of federal litigation.

2. PETITIONER'S REPLY TO ARGUMENT OF RESPONDENT THAT THERE IS NO CONFLICT WITHIN THE 7TH CIRCUIT COURT OF APPEALS RESPECTING THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY LOCATED IN ILLINOIS UNDER ILLINOIS LAW.

Respondent interprets the 1967 *Cummings* opinion as holding "that the bankruptcy laws prevented MJDM from perfecting a judgment lien against the property" . . . (Brief in Opp. p. 4).

The 1967 *Cummings* opinion did not hold that the bankruptcy laws prevented MJDM from perfecting a judgment lien against the property, but determined the priority of liens, holding that the lien of the Trustee in Bankruptcy was valid as of December 9, 1964, and MJDM's lien, being perfected thereafter, was null and void as against the Trustee. (Pet. for Cert. p. 11a, 13a).

The 1967 *Cummings* opinion "that MJDM's remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of the judgment" (Pet. for Cert. p. 13a) makes it clear that a federal judgment lien *was* perfected on March 12, 1965 when MJDM's judgment was recorded, and that no law existed affecting the finality of the June 3, 1964 judgment which would have prevented it, upon recording, from perfecting a federal judgment lien at any time between June 3, 1964 and the bankruptcy proceedings.

The *Stevens* opinion that "it follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy" (Pet. for Cert. p. 6a) is in direct conflict with the *Cummings* opinion.

3. PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT THAT THE COURT OF APPEALS HAS CORRECTLY DECIDED AN IMPORTANT STATE QUESTION RESPECTING THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY IN ILLINOIS.

In support of the argument that MJDM's judgment was not "final and executable", as a matter of Illinois law, respondent cites the following cases: *Noe* v. *Moutray,* 170 Ill. 169, 177, 48 N.E. 709, 712 (1897); *City of Chicago* v. *Hall,* 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell,* 298 Ill. App. 434, 440, 90 N.E. 2d 111, 114 (1939). (Brief in Opp. p. 4)

Noe v. *Moutray,* involved an individual who had executed a deed of conveyance of real property nine years prior to his death. The grantees of the deed did not record the deed during the lifetime of the grantor, but waited until approximately 6 months after the grantor's death intestate. After the grantor's death but before the grantees had recorded the deed, the Probate Court had allowed several creditors' claims against the decedent's estate.

The issue before the court was whether or not a creditor's claim allowed against a decedent's estate by the probate court created a lien on the decedent's real estate within the meaning of the Illinois Recording Act so as to entitle the probate claimants to a priority as against the grantees of the unrecorded deed, executed by the deceased in his lifetime and remaining unrecorded at the time of the allowance of the probate claim.

The Court held that claims allowed against the decedent's estate by the probate court were not judgments within the meaning of the Illinois Recording Act upon which a lien could be created, which is not relevant to the issue at bar.

The Court stated at p. 712:

> A valid judgment, in order to create a lien, must possess two qualifications: First, it must be final and for a definite sum; and, second, it must be such a judgment that execution may issue thereon. 12 Am. & Eng. Enc. Law, p. 104; 1 Black, Judgm. sections 407, 408; *Mitchell* v. *Mayo, supra;* Rev. Stat. Ill. c. 77, sec. 1. A judgment or claim allowed against an estate is not final or definite in amount, so far as the real estate is concerned, for two reasons. In the first place, the exact amount of it to be paid by a sale of the real estate cannot be definitely ascertained until the personal estate of the decedent is exhausted.
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> In the second place, the heirs are not bound by such judgment. When a petition is filed by an administrator to sell the land for the payment of the claims allowed against the estate, the heirs and devisees are required, under the statute, to be made parties. Their interest cannot be affected by the judgment rendered against the administrator without notice to them. They have the right to come into court, and question and disprove the items included in or constituting such a judgment, if they can. In the proceeding to sell the land, they may set up any defenses which they had no opportunity to set up when such judgment was obtained, and consequently it is not final as to the heirs when originally allowed against the estate.
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> Such a judgment against an estate lacks the second qualification above referred to, because execution cannot issue upon it. If the judgments against Joseph

> Johnson had been rendered in his lifetime, the holders of them, having no notice, at the time of their rendition, of the unrecorded deed above described, would be entitled to enforce them as prior liens against his lands ahead of the rights of the grantees in such deed. But the creditors here obtained the allowance of their claims against the estate of Joseph Johnson after his death, and after he had in his lifetime conveyed away the land in question. They have no more right to priority over the grantees in the deed unrecorded than if it had been recorded.

MJDM's federal judgment was a final judgment within the meaning of *Noe* in that the exact amount was definitely ascertained to be $107,587.06 reduced by remittitur to $60,261.77.

MJDM's judgment did possess the qualification of executability as in *Noe,* in that Hamilton Steel Products, Inc. was an existing legal entity, with notice, on the date of rendition of the judgment and the judgment was immediately "executable" at any time prior to the bankruptcy proceedings.

City of Chicago v. *Hall* involves a creditor's claim to a prior lien against other creditors by reason of having first commenced a suit at law before other creditors had instituted any suits at law or chancery. The court held at p. 348:

> "Under the laws of this state, the mere institution of a suit does not create a lien on anything. It is the final judgment or decree that creates a lien."

Lehman v. *Cottrell* is a case involving a conflict between the Illinois Homestead Exemption Statute and the Illinois Statute creating judgment liens.

In holding that the Homestead Statute specifically created an exemption from the lien of a judgment, the court stated:

> At common law, land was subject neither to execution nor to the lien of a judgment. Both these results are purely statutory. The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. Hence, where the right of sale cannot be asserted, the existence of the lien must be denied. Freeman on Judgments (3d Ed.) ch. 14, secs. 339, 340, 355; Freeman on Executions, Para. 249, p. 388. It would follow as a logical result from the application of this general principle that a judgment rendered after the creation and during the existence of a homestead cannot be a lien thereon.

This analysis of the cases cited by Respondent shows that none of them support his position that, under Illinois law, MJDM's June 3, 1964 federal judgment was not "final and executable" on the date it was rendered.

In further support of Respondent's argument that MJDM's judgment was not "final and executable" on June 3, 1964, Respondent relies on 1 *Black on Judgments,* sec. 407 (1902) wherein the following requirements are stated as being necessary to the creation of a judgment lien: (1) a judgment capable of collection by execution, (2) a judgment rendered by a lawful and validly constituted court, (3) a valid and subsisting judgment, and (4) a judgment for a definite and certain sum of money.

All of these elements were present on June 3, 1964, the date of entry of MJDM's judgment and so remained, notwithstanding the stay of execution order nor the filing of the new trial motion.

Respondent further cites 2 Freeman on Judgments, sections 929, 930 (1925) to support the proposition that MJDM's June 3, 1964 judgment was not "final and executable."

Section 929 of Freeman states that the nature of a judgment to create a lien must be one that is (1) final as distinguished from interlocutory (2) it must create a definite personal liability which is immediately enforceable, and (3) it must be for a definite specified sum.

In Section 930, Freeman states:

> As heretofore stated, a lien of judgment is a consequence of the *right* to sell real estate for its satisfaction, and when that right is conceded, the existence of the lien is generally admitted, and whenever that right is denied, the existence of the lien is also denied, even under a statute making judgments a lien upon all the property of the debtor both real and personal. Decrees for a definite sum of money and *capable* of being enforced by execution, are therefore liens upon real estate. But judgments upon which no execution may issue, as judgments against a state or municipal corporation, create no liens, and judgments upon which the *right* to issue execution has terminated, cease to be liens. (emphasis added.)

It cannot be said that MJDM's right to sell Hamilton's real estate in satisfaction of its June 3, 1964 federal judgment did not exist on June 3, 1964 because of the stay of execution order. A stay of execution order is based upon the existence of the right of execution.

Section 994, Freeman on Judgments, more clearly states the precise issue of the instant case:

> If when a judgment is entered, or afterwards, the court directs that execution be stayed for a time specified, this does not in any way affect the lien

of the judgment, nor prevent it from attaching at once and continuing during the period in which the right to enforce the judgment is suspended.

CONCLUSION

It is respectfully submitted that the instant case involves principles of sound judicial discretion which this court should not ignore, but review on writ of certiorari.

Respectfully submitted,

ALBERT H. BEAVER
Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-866

M.J.D.M. TRUCK RENTAL, INC. & WILLIAM V. DE MAIO,
Petitioners,

v.

WILLIAM J. O'BRIEN, *Respondent.*

No. 75-887

THEMIS N. ANASTOS & HUGH M. MATCHETT,
Petitioners,

v.

WILLIAM V. DE MAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR., *Respondents.*

PETITION FOR A RE-HEARING OF THEIR PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes M.J.D.M. Truck Rentals, Inc. and William V. De Maio, Petitioners in Case No. 75-866 by their attorney Albert H. Beaver, and Themis N.

Anastos and Hugh M. Matchett, Petitioners in Case No. 75-887 by their attorney Hugh M. Matchett, and petition for re-hearing of their petitions for writ of certiorari to the United States Court of Appeals for the Seventh Circuit which were denied on February 23, 1976. This petition is being filed pursuant to Rule 58 (2) of the rules of this Court on substantial grounds available to petitioners although not previously presented.

This petition for re-hearing is due on or before March 12, 1976.

Hugh M. Matchett and Albert H. Beaver certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified.

FEDERAL AND STATE QUESTIONS PRESENTED

Whether the decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment, is a violation of petitioner's federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provisions would be unconstitutional under the Constitution of Illinois, Article I, Section 2, and under the 14th Amendment, Section 1, to the Constitution of the United States, in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws by the State of Illinois.

The decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment is a violation of petitioners' federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provision would be unconstitutional under the Constitution of Illinois Article 1, Section 2 providing "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."; and under the 14th Amendment, Section 1 to the Constitution of the United States providing: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."; in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws, by the state of Illinois. This Federal and State question was not raised in or passed on by the United States Court of Appeals for the Seventh Circuit, but it is submitted that we are within well recognized exceptions to the rule that this Court will not take jurisdiction and decide Federal questions when they have not been previously raised in litigation, in that the decision of the United States Court of Appeals came as a surprise and petitioners had no real opportunity to raise the constitutional question in their petitions for re-hearing in the Court of Appeals. This case is within the rule enunciated by this Court on several occasions, that where there has been "funda-

mental error" clearly determinative of the case, this Court will consider the issue even though it was not raised below (*Terminello v. City of Chicago,* 1949, 333 U.S. 1; *Silback v. Wilson & Co.,* 1941, 312 U.S. 1; *Mahler v. Ebby,* 1924, 264 U.S. 32.)

CONCLUSION

For the reasons stated, petitioners pray that the Court will issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit or, in the alternative will vacate its order denying their petitions for writ of certiorari, and will issue an order referring the Federal and State Constitutional question presented to the United States Court of Appeals for the Seventh Circuit, subject to review by this Court.

Respectively submitted,

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